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In the Supreme Court of the United States

OCTOBER TERM, 1962

FEDERAL TRADE COMMISSION, PETITIONER

v.

TIMKEN ROLLER BEARING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
J. WILLIAM DOOLITTLE,
Assistant to the Solicitor General,
ROBERT B. HUMMEL,
LEWIS A. ENGEL,
Attorneys,
Department of Justice, Washington 25, D.C.

JAMES McI. HENDERSON,
General Counsel,
J. B. TEULI,
Assistant General Counsel,
ALVIN L. BERMAN,
THOMAS F. HOWDER,
Attorneys,
Federal Trade Commission,
Washington 25, D.C.

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The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on February 16, 1962.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–6a)[1] is reported at 299 F. 2d 839. The Commission's findings, order and opinion (App. C, *infra*, pp. 1c–25c; Tim. App. 39a–60a)[1] are not yet reported.[2]

[1] "Tim. App." and "FTC App." refer to the printed appendices to respondent's and the Commission's briefs, respectively, in the court of appeals.

[2] An earlier opinion of the Commission, reversing the hearing examiner's dismissal of the complaint after the Commission's case had been presented (Tim. App. 20a–30a), is reported at 54 F.T.C. 1909. The hearing examiner's first initial decision (Tim. App. 11a–19a) is unreported.

The initial decision of the hearing examiner (App. D, *infra*, pp. 1d–11d; Tim. App. 31a–38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1962 (App. B, *infra*, p. 1b). On May 10, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in overturning a Federal Trade Commission order for lack of adequate support in the record, the court below failed to make a fair assessment of the record and substituted its own evaluation of the weight of the evidence for that of the Commission, thereby grossly misapplying the statutory standard governing judicial review of agency findings.

2. Whether, in appraising the weight of the evidence and in determining whether respondent's conduct violated Section 3 of the Clayton Act, the court below erred in failing to take into account respondent's overwhelming dominance over the industry in which is operates.

STATUTE INVOLVED

Section 3 of the Clayton Antitrust Act, 38 Stat. 731, 15 U.S.C. 14, provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented

> or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors, of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 11(c) of that Act, 38 Stat. 734, as amended, 15 U.S.C. (Supp. III) 21(c), provides in pertinent part:

> * * * * * *
>
> The findings of the commission * * * as to the facts, if supported by substantial evidence, shall be conclusive. * * *
>
> * * * * * *

STATEMENT

Respondent, the Timken Roller Bearing Company, is the world's largest producer of tapered roller bearings (FTC App. 18b). It produces from 65 to 75 percent of such bearings manufactured in the United States (Tim. App. 814a). Respondent sells these bearings both for use as original equipment and for replacement purposes in automobiles, trucks, buses, tractors and industrial machinery. Its sales for the replacement market, which is the only phase of respondent's business involved in this case, are

carried on through authorized distributors and jobbers.[2] Respondent's sales in this market run to between 10 and 20 million dollars annually, or 10 and 25 times the annual sales, respectively, of its two nearest competitors—Federal-Mogul-Bower Bearings, Inc. ("Bower"), and Tyson Bearings Corp. ("Tyson")—and its authorized distributor and jobber outlets total approximately 7,500, or more than twice the combined total of these competitors (Tim. App. 41a-42a). Respondent makes more than 11,000 different items in its line of bearings, or about 14 times the number of its nearest competitor (*id.* at 42a).

The Federal Trade Commission issued a complaint in 1956, charging respondent with violating Section 3 of the Clayton Act by selling its tapered roller bearings to its distributors and jobbers on the condition, agreement or understanding that they not deal in similar products of a competitor (Tim. App. 2a–6a). The complaint charged that the effect of this conduct may be to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of tapered roller bearings. Respondent denied the charges (*id.* at 7a–11a). Extensive evidentiary hearings were held in which counsel for the Commission relied primarily upon documentary

[2] Distributors purchase directly from respondent, while jobbers purchase the bearings from distributors. Both pay the same price, but distributors receive an additional discount on bearings resold to jobbers.

evidence, and Timken presented testimony of a large number of its dealers and employees.[4]

1. *The Commission's Evidence.* Commission counsel presented two general classes of documentary evidence. One group of approximately 120 documents consisted largely of reports by Timken's branch managers and salesmen (either directed to, or copies of which went to, the home office) concerning calls upon actual or potential distributors and jobbers of Timken bearings. These visits were made between 1949 and 1955, and the reports were written contemporaneous accounts of the visits. Another group of approximately 100 documents comprised reports of the cancellation of Timken dealerships. Following are typical, but by no means exhaustive, excerpts from these documents.[5]

a. *Reports of Branch Managers.* The Boston Branch Manager and a salesman who had called upon a Maine jobber and found 12 Bower bearings in his

[4] At the close of the Commission's case respondent moved to dismiss the complaint, contending that Commission counsel had failed to establish a prima facie case. The hearing examiner granted the motion (Tim. App. 11a–19a). Commission counsel appealed to the Commission, which vacated the initial decision, holding (Commissioner Gwynne dissenting without opinion) that the hearing examiner had "applied a wholly erroneous test" in assessing the Commission's case and that a prima facie case had been established (*id.* at 29a–30a). The Commission also ruled that the examiner had improperly excluded some 80 documents relating to respondent's relations with its dealers (*id.* at 29a, 26a–30a). The case was remanded to the hearing examiner for further hearings (*id.* at 30a).

[5] Each excerpt is footnoted to set forth the explanation of the statements in the reports offered by respondent's witnesses at the 1958–1959 hearings. See notes 6–25, *infra*.

stock reported that the jobber said he "would purchase only Timken in the future" (Tim. App. 708a).[6] This same Branch Manager reported that when a particular Massachusetts dealer had become an authorized jobber, "we felt it imperative to load them with Timken to insure 100% of the tapered rolling business"; he went on to report that he had been assured of the jobber's "complete loyalty to Timken" (*id.* at 732a–733a).[7] He also reported having told a Boston distributor that an analysis of his sales indicated purchases on the open market; the distributor was "[w]arned * * * about open market purchases" and told that, in view of the breadth of Timken's line, "there would be no necessity of future outside buying. We set a quota of $40,000 for him" (*id.* at 402a–403a).[8]

The New York Branch Manager and a salesman who had called upon a Connecticut jobber and found $100 worth of Bower bearings reported the jobber as having said that "he knows that we would not countenance that sort of dual buying and it would only

[6] The Branch Manager testified that he had noticed these 12 bearings because they were too obvious to miss and that he instituted the reported discussion to find out if Timken had let the customer down in delivery (Tim. App. 714a–715a).

[7] The Branch Manager said he meant that, "in order to assure ourselves of a greater proportion of Timken business," if the dealer was sold enough Timken bearings "certainly there'd be no need of them buying competitive make bearings"; he testified that by "loyalty" he meant that such dealers are "bound to buy and sell only Timken, because that is what they had available" (Tim. App. 736a).

[8] The Branch Manager explained that the establishment of a $40,000 quota described in the report was just "good-natured joshing" (Tim. App. 408a).

be a question of time when we would cancel his contract or put him on direct" (Tim. App. 563a, 564a).[9] The Philadelphia Branch Manager wrote to a distributor that consideration was being given to appointing a particular jobber as an authorized distributor "providing proper arrangements can be made to set them up 100% as a Timken account" (*id.* at 612a).

The Atlanta Branch Manager reported, with respect to the appointment of a North Carolina distributor, that he "naturally approached him on the idea of going 100% Timken in all of his stores" and told the dealer that "our only requirement was that he confine his tapered roller bearing purchases to us exclusively in the future and could dispose of his present inventory in the manner he found best fit * * *" (Tim. App. 571a; 572a).[10] The Dallas Branch Manager requested home office approval of the appointment of a Texas distributor "as we have their assurance that they will dispose of their entire

[9] The Branch Manager testified that this was "simply a statement or belief of his, which was not elicited by me, and he was simply reporting a condition—of our entire relationship with the account * * *. He was using that for my judgment, to make a case for himself for direct appointment". (Tim. App. 569a).

[10] When a salesman who had accompanied the Branch Manager was asked at the hearings 7 years later whether any such statement was made in his presence, he replied, "No, sirree". (Tim. App. 590a). (This is the same salesman whose testimony is also set forth in notes 18 and 19, *infra*.) An official of the dealer, who had not been present during the negotiations, testified that such conversation could have occurred, but that his company had not thereafter so operated (*id.* at 578a-579a, 587a-588a).

Bower stock within 120 days" (*id.* at 278a).[11] With respect to taking on a New Mexico account, the Dallas Branch Manager reported to the home office that "they were definitely sold 100%, as they have agreed to dispose of their Bower stock within the next six months and at that time remove all of their Bower bearings from their shelves" (*id.* at 303a).[12]

The Chicago Branch Manager wrote the home office that an Illinois account had "purchased a quantity" of competitive bearings "and I think this act of disloyalty is justification for our cancelling the account" (Tim. App. 661a–662a).[13] In requesting the appointment of a Missouri jobber to a distributorship, the Kansas City Branch Manager wrote the home office that the dealer "will dispose of his Tyson bearings as soon as possible after being appointed a Timken Distributor" (*id.* at 369a).[14]

The Assistant General Manager of the Service-Sales Division wrote to the Minneapolis Branch Manager relative to appointing a Minneapolis jobber as a distributor that he was disturbed by the jobber's questionable "loyalty," since "to purchase or augment our

[11] See note 20, *infra*, concerning the same distributor.

[12] The Branch Manager testified that the time mentioned was merely his estimate of how long it would take to dispose of the Bower stock in the normal course of sales (Tim. App. 306a-307a).

[13] The Branch Manager testified that the account was cancelled because of poor credit and because he purchased a large quantity of surplus bearings, which could possibly have been defective (Tim. App. 662a).

[14] The dealer testified that there was no discussion about this but that it was just generally "understood" that the competitive stock would be disposed of (Tim. App. 372a, 377a).

line with a competitive product without previously advising us" was disloyal; the Branch Manager was advised that he could make the appointment if he thought the dealer "can be educated to extend the proper loyalty * * *" (FTC App. 43b). The Minneapolis Branch Manager reported back that, the dealer having said he "certainly would not purchase in another direction" if given a distributorship, "[w]e believe we have the point of loyalty well qualified with" the dealer (*id.* at 20b).[15]

The San Francisco Branch Manager reported that he had called upon a California dealer about the possibility of its becoming a distributor and was told that "they would be very pleased to drop the Bower line in all of their outlets and go 100% Timken" (Tim. App. 310a–311a).[16] The Los Angeles Branch Manager wrote to a distributor concerning a jobber appointment that Timken "reserve[d] the right to review this account within a reasonable length of time to determine if they have disposed of their assorted stock of tapered roller bearings" (*id.* at 379a).[17]

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[15] The Branch Manager testified that this correspondence concerning "loyalty" was prompted by the jobber's poor purchase record (Tr. 1312–1321).

[16] The dealer testified that it was "completely understood" between himself and the salesman that the Bower stock would be sold out and replaced with Timken in all of the dealer's stores (Tim. App. 319a). The Branch Manager testified, however, that there was no understanding about the dealer's selling off the Bower stock as a condition of granting him a distributorship (*id.* at 329a–330a).

[17] The Branch Manager explained at the hearings that "we can't get their business if they handle these other miscellaneous makes of bearings" (Tim. App. 381a).

b. *Salesmen's Reports.* One salesman reported that, after he told a North Carolina jobber that Timken "would not condone his carrying Tyson bearings in his Laurinburg store as long as he was a Timken jobber," the jobber promised him "their complete cooperation" (Tim. App. 607a-609a).[18] In reporting on another North Carolina account, this salesman said the account was "willing to confine his purchases of tapered bearings to our line 100% provided we [are] willing to take him on as a distributor" (FTC App. 19b).[19] A Texas salesman reported having told a dealer "that we were interested in making them a Timken distributor but that we should have to have a definite understanding with regards to their present Bower stock and its eventual disposal"; the salesman "made it quite clear that * * * there would have to be a predetermined time when there would be an end to any Bower on their shelves" (Tim. App. 279a).[20]

A New York salesman reported that Bower bearings predominated in a prospect's stock but that "he agreed that he would buy all his tapered bearings in the future from us" (Tim. App. 742a).[21] A sales-

[18] The salesman testified that this was "just a gross exaggeration on my part" (Tim. App. 630a). See note 10, *supra*.

[19] The salesman explained that this was the customer's statement, not his (Tim. App. 779a). See note 10, *supra*.

[20] The Dallas Branch Manager (whose own report on this account is referred to at pp. 7-8, *supra*) testified that the salesman acted on "my instructions," that this was "the only [such instruction] I have ever given," that he "wouldn't do that again" and that he was "reprimanded" for this action (Tim. App. 285a-287a). But cf. the same Branch Manager's later report on a New Mexico account, referred to at p. 8, *supra*.

[21] The salesman testified that the prospect volunteered this remark. (Tim. App. 745a).

man reporting a call on a Pennsylvania prospect said the dealer was "very willing to forsake Bower for a direct appointment with Timken" and that the dealer "[w]ill purchase only Timken Bearings" (*id.* at 414a).[22] A salesman in the Pittsburgh branch who called on another Pennsylvania dealer reported that he was "given definite assurance that no further Bower orders will be placed" (*id.* at 422a).[23] A salesman reporting on a Tacoma, Washington, jobber being considered for appointment said that the dealer "has agreed" to certain terms, including that "[h]e will dispose of A.B.C., Majestic, etc., now in his stocks at time of appointment" (*id.* at 745a, 747a).[24]

c. Reports of Cancellations. Inter-office reports were made on the cancellation of Timken distributor and jobber contracts. On each of the forms appears the question, "Why is this account being cancelled?" Commission counsel introduced the reports on the cancellation of some 100 distributor and jobber accounts in which the answers referred to the handling of competitive products by the cancelled account. Among the statements in the reports were the following: "Has Gyp & Bower in his stock & refuses to get rid of same"; "Took on Bower"; "Tyson Stock increasing over past year. Set-up as a GLD by Gib-

[22] The Branch Manager testified that this account had not been required to dispose of its Bower stock before getting the appointment (Tim. App. 418a).

[23] The salesman testified that the assurance was volunteered by the dealer (Tim. App. 425a).

[24] The Seattle Branch Manager testified that salesmen had no authority to make agreements on behalf of the company (Tim. App. 750a).

son"; "Being cancelled because of noncooperation, picking up too many Bower bearings"; "Picking up Bower bearings indiscriminately"; "Continues to sell Bower bearings"; "Not loyal"; "Stocking Bower bearings"; "Failed to live up to their Timken jobber Agreement. Have taken on Bower franchise"; "Handling competitive bearing"; "Handling Hoover and A.B.C."; "Carrying competitive brands and refusing to cooperate"; "Picking up Bower, Not loyal and of no value to us" (Tim. App. 491a, 499a, 526a, 752a, 754a, 756a, 758a, 764a).[25]

2. *Timken's Evidence.* Respondent introduced the testimony of a number of its dealers and employees to explain why the documents introduced by the Commission did not reflect a policy on the part of Timken to sell its products only on the condition that the purchaser buy from it exclusively. In addition, respondent's officials and salesmen affirmatively testified that respondent did not have a policy of selling its products on the understanding that its customers would deal only in respondent's products (Tim. App. 163a–164a, 180a–181a, 188a–189a, 201a–202a). These witnesses testified that they had often observed competitive stocks on the shelves of their customers (*id.* at 205a–253a).

The General Manager of the Service-Sales Division, whose final approval was necessary for the appointment of all distributors (Tim. App. 173a), ac-

[25] Respondent offered testimony and sales records to show that the particular accounts were cancelled because of poor sales volume (Tim. App. 751a–777a).

[26] See notes 6–25, *supra*.

knowledged that it was company policy to "deal only with accounts * * * that agree to sell our line predominantly and the contract [7] is an acceptance on the part of both parties to perform that function" (*id.* at 173a–174a). Respondent's branch managers testified that their dealers are expected to devote their "major" or "primary" efforts to the sale of respondent's line (FTC App. 9b–13b). The Detroit Branch Manager, who has been with the company since 1933 (*id.* at 12b), explained that when he said "major" efforts, he "wouldn't be satisfied with 55 per cent of their effort. I want 90 per cent or better" (*id.* at 13b). The Atlanta Branch Manager testified that by "primary" effort, he meant promotion that "would approach 90%" (*id.* at 10b).

Respondent also offered testimony of current dealers to show that they did handle competitive brands of roller bearings to some extent. This evidence tended to show that the handling of competitive brands took place under the following circumstances: (1) to enable the gradual reduction of competitive stocks following appointment as a Timken dealer (Tim. App. 64a, 67a–68a, 70a, 76a–77a; 80a, 84a, 87a–88a, 102a, 105–106a, 128–129a, 132a); (2) to handle "emergency" needs—*i.e.*, to fill an order where there

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[7] The contract is the written agreement between respondent and its dealers, and under it the dealer must buy that quantity of bearings "which in the judgment of the Company will be adequate to serve the locality" and must maintain "at all times a sufficient assortment of Timken Bearings to care for the running demand"; the jobbers also agree "[t]o cooperate with [respondent's representatives] * * * in checking stock * * *" (FTC App. 14b–15b, 16b).

may have been a delay in obtaining Timken bearings (*id.* at 69a, 81a, 87a, 93a, 95a–100a, 131a–132a); and (3) to accommodate a valued customer who makes a specific request for another brand (*id.* at 75a, 109a–110a, 119a).

3. *The Administrative Decisions.* The hearing examiner, in his initial decision, dismissed the complaint, holding that the record failed to establish that respondent had sold its bearings on the condition proscribed in the statute (App. D, *infra*, pp. 1d–11d). In his view, the inter-office correspondence represented "only a relatively small number of isolated instances" indicating sales on the forbidden condition, and their probative value was "materially weakened" by the explanatory testimony offered by respondent's witnesses (*id.* at p. 4d), which he believed (*id.* at p. 6d). The examiner emphasized that respondent's present and former general managers, all of its branch managers and some twenty salesmen "[a]ll testified unequivocally that Timken has no policy requiring exclusive dealing * * *; that all the company expects of its distributors and jobbers is that * * * they will devote their primary or principal sales efforts to the Timken line * * *" (*id.* at pp. 5d–6d). The examiner also found that respondent's dealers frequently handled competing bearings without interference by respondent (*id.* at p. 6d).

The Commission, acting unanimously,[28] set aside the examiner's decision, made its own findings of fact and entered a cease-and-desist order (App. C, *infra*, pp. 1c–25c). It found that the "[n]umerous docu-

[28] Commissioner Mills did not participate "for the reason he did not hear oral argument" (App. C, *infra*, at p. 6c).

ments introduced in evidence" show that respondent does sell to its dealers "on the condition" forbidden by the statute (*id.* at p. 3c) and that this conduct by a company with 40 and 25 times the dollar sales volume, respectively, of its two closest competitors and more than twice the combined total of their outlets, had the proscribed anti-competitive effects (*id.* at p. 4c). The Commission held that the examiner was "clearly in error" in ruling that the inter-office correspondence relied on by Commission counsel represented only a relatively small number of isolated instances of selling on the forbidden condition (*id.* at p. 14c). The documents, it noted, implicate individuals "throughout respondent's entire replacement sales organization, from salesmen through home office executives" and "cover the activities of the sales organization in all parts of the country * * *" (*ibid.*). The Commission held that the examiner also erred in ruling that, as a result of the exculpatory testimony of respondent's witnesses, the inter-office correspondence had little probative value (*id.* at pp. 17c–19c). It called attention to the "variance" between the contemporary written statements and the explanation given by respondent's officials and salesmen and ruled that "[w]here, as here, oral testimony given several years later, is not consistent with contemporaneous written statements, such oral testimony can be given little weight" (*id.* at p. 19c).

The Commission further held that it could accept the testimony of respondent's witnesses with respect to respondent's sales policy, for this testimony was not inconsistent with its conclusion that respondent was selling on the forbidden condition. In the Commis-

sion's view, respondent's admitted requirement that its dealers devote their "principal sales effort to the Timken line" meant "exclusivity" in the circumstances of this case because "in practically all instances, they [respondent's dealers] were carrying Timken products to the exclusion of competitors' products except for * * * 'emergency' or 'accommodation' purchases * * *" (App. C, *infra*, at pp. 22c–23c). For that reason, the Commission found, "these dealers would cause the respondent no concern" and "[w]e * * * can accept their testimony that they have not been threatened with cancellation by respondent" (*id.* at p. 23c).

4. *The Decision of the Court of Appeals.* The court of appeals set aside the Commission's order and directed that the complaint be dismissed (App. A, *infra*, p. 6a). The court did not reach the issue of whether respondent's sales practices had the proscribed effects upon competition, for it held that there was no substantial evidence to support the Commission's finding that respondent had engaged in exclusive dealing. In its view, the evidence established only that Timken expected its dealers to be "loyal," and that by this Timken meant only "that its dealers should devote themselves primarily to the resale of Timken be..rings"; that, while salesmen sometimes suggested cancelling dealerships because the dealer was stocking competitive bearings, Timken had no "hard and fast policy" of instructing dealers against such purchasing (*id.* at pp. 2a, 3a). The court noted that only one witness, a former dealer, had testified that he had been cancelled because he had dealt in a competitor's bearings, while 37 current

dealers had said they "felt free to deal in competitive bearings" and "had actually done so to some extent" (*id.* at p. 4a). It also observed that respondent had introduced evidence to explain each cancellation cited by the Commission, and that "numerous Timken officials testified that * * * its dealers did handle competitive bearings with the full knowledge and consent of the company, so long as their primary effort was devoted to the Timken line" (*ibid.*). The court concluded that to uphold the Commission's order would destroy the respondent's "right to select [its] own customers" (*id.* at p. 5a).

REASONS FOR GRANTING THE WRIT

This case is of importance to the due enforcement of the antitrust laws, whether it is considered alone or in terms of its impact on other antitrust litigation. Respondent is a $50 million corporation that dominates the tapered roller bearing industry, accounting for two-thirds to three-fourths of the industry production and selling 10 times as many replacement bearings as its nearest competitor (FTC App. 17b; see pp. 3–4, *supra*); indeed, its preeminence in the entire field of antifriction bearings, a field vital to the functioning of American industry as a whole, has long been recognized. See, *e.g.*, *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 289 (N.D. Ohio), modified and affirmed, 341 U.S. 593; see also *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603–04 (concurring opinion). The Federal Trade Commission, on the basis of a full evidentiary record, found that this powerful firm was selling its products to its dealers on the condition that

they not handle the goods of its competitors, in violation of Section 3 of the Clayton Act. In setting aside the Commission's order, the decision of the court below would not only sustain—indeed, reinforce—respondent's position of overwhelming dominance in its industry, but it would raise both substantive and evidentiary difficulties in the enforcement of the antitrust laws against comparably predominant firms in other industries. A ruling of such far-reaching significance should, we submit, be reviewed.

1. Accepting the statement of the court below that its decision rests solely on its conclusion that the Commission's order "is not supported by substantial evidence in the record considered as a whole" (App. A, *infra*, at p. 6a), we submit that this case plainly presents that "rare instance" in which the standard for the judicial review of agency findings has "been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. Not only did the court below fail to make "a 'fair assessment' of the record" (*ibid.*) in support of the Commission's order, but it improperly substituted for the Commission's expert judgment its own evaluation of the weight to be given the evidence. Such a fundamentally defective process of review should not be allowed to stand.

The Commission, in exercising its statutory fact-finding function under Section 11(c) of the Clayton Act, 15 U.S.C. (Supp. III) 21(c), attached considerable weight to the evidence of respondent's practices and policies furnished by a large number of contemporaneous written statements. These state-

ments plainly disclosed a pattern on the part of respondent's officials and salesmen of extracting agreements from dealers, to go "100% Timken" (Tim. App. 310a, 311a, 571a, 572a), to "confine * * * purchases" to Timken "exclusively" or "100%," (*id.* at 572a; FTC App. 19b) to "purchase only Timken" or "buy all his tapered bearings in the future from" Timken (Tim. App. 414a, 708a, 742a), to "dispose of" competitive stock within a limited time (Tim. App. 278a, 303a, 379a, 745a), to "forsake" competitive products (Tim. App. 414a), not to "purchase in another direction" or "order anymore" from Timken's competitors (FTC App. 20b, 25b), etc. The Commission found these written statements to establish not only a company policy of requiring exclusive dealing (App. C, *infra*, pp. 8c–14c) but also a practice of "policing" or enforcing that policy by frequent examinations of the dealers' inventories (*id.* at pp. 16c–17c). Relying upon this Court's decision in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395–96, the Commission ruled that exculpatory testimony of respondent's officials and employees was entitled to little weight because it was given several years after the contemporaneous written statements and was fundamentally inconsistent with them (App. C, *infra*, pp. 17c–19c). The Commission did, on the other hand, accept uncontradicted testimony of respondent's officials that was not inconsistent with the written statements (*id.* at pp. 22c–23c).

In overturning the Commission's decision, the court below made no reference whatever to the Commission's explicit grounds for evaluating the testimony as it did. The court simply set forth *its* view of the

evidence and, without so much as suggesting its reasons for doing so, rejected out of hand the wealth of incriminating documentary evidence and accepted the exculpatory testimony of respondent's officials and employees. This is a clear example of a reviewing court's substituting its appraisal of the evidence for that of the Commission, the body charged by Congress with the responsibility of weighing the evidence. This Court's analysis of the circumstances in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73, is wholly applicable here:

> "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U.S.C. § 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding[s] * * * had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision * * * forbid that exercise of power.

The court's failure fairly to assess the record is perhaps most dramatically illustrated by its description of "the Commission's whole case" (App. A, *infra*, at p. 2a):

> In our view, the Commission's whole case rests upon the fact that, in these [salesmen's] reports, the salesmen either recommended Timken's taking on a new account because it would be "loyal" to that company, or suggested that an old account be cancelled because the dealer was stocking the products of a Timken competitor.

Even if one ignored the non-documentary portion of "the Commission's whole case"—for example, the Commission's acceptance of the testimony of top management admitting that their demands for "loyalty" meant at least 90 percent concentration on Timken products (see pp. 12-13, *supra*)—this description of the record support for the Commission's decision would be unfair. The reports, not just of salesmen but of Branch Managers as well, were in terms, not simply of demanding "loyalty," but of requiring dealers to buy Timken "100%," "only," "exclusively," and to "dispose of," "forsake," "not purchase" competitive products, and of policing their compliance. Incriminating statements such as these appear far too frequently in the record to be entirely overlooked, as they were by the court below. No fair appraisal of the record could fail to detect their significance.

2. The court of appeals' conclusive and unexplained preference, contrary to the doctrine of the *United States Gypsum Co.* case, *supra*, of exculpatory live testimony over incriminating documentary evidence is particularly prejudicial in this and similar types of economic situations. When a company has as complete and overwhelming dominance over the industry in which it operates as respondent has, its dealers will naturally be reluctant witnesses against its restrictive practices—indeed, they will be unusually vulnerable to suggestions that they be witnesses in *favor* of the dominant company. Cf. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 82. Because of this commercial fact, it is inevitable that in any type of antitrust proceeding against a company so situated, the government's evidence (or plaintiff's, in

a private suit) will often have to consist largely of incriminating documentary material. The Commission, a body whose expertise surely comprehends this fact, was entitled to reflect it in its appraisal of the evidence. The refusal of the court below to give any consideration to this fact could, if followed generally, seriously impede the effective enforcement of the antitrust laws in the very areas where such enforcement is most needed. Review by this Court seems plainly called for.

3. It was not only in assessing the weight to be given the testimony that the court below failed to take adequate account of Timken's predominant industry position. So far as its opinion discloses, the court gave no consideration to that critical fact for any purpose whatever. The court apparently thought that violations of the Act are committed in precisely the same way by all firms, irrespective of relative size or industry position. Such an unrealistic view leaves out of account the fact that a massively dominant firm might be able to extract and enforce a fully effective exclusive dealing arrangement by the most subtle suggestion (such as bids for "loyalty") where firms with less economic leverage would have to resort to overt persuasion and written understandings.[29] This approach, moreover, fails to recognize that a so-called "exclusive dealing arrangement" may fall farther short of actual 100 percent "exclusivity" and still

[29] The court below, in relying upon *United States* v. *Colgate & Co.*, 250 U.S. 300, to legitimate Timken's conduct (App. A, *infra*, at pp. 5a–6a), did not mention or apparently even consider subsequent decisions of this Court which have made it

"substantially lessen competition" if imposed by an industry giant than if required by a smaller operator.

The full extent to which the court's failure to come to grips with these questions affected its ultimate decision cannot, of course, be divined from its opinion. The court simply concluded that, on its view of the evidence, no violation of the law had been proved, without giving any clear indication of where the alleged failure of proof lay. However, the court's failure even to discuss Timken's indusfry position justifies the assumption that it regarded that circumstance as irrelevant in deciding whether the law had been violated. Such an approach to Section 3, as, of course, to the antitrust laws generally, carries with it serious implications for the due enforcement of the antitrust laws that should not go unreviewed.

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clear that such practices as Timken's extraction of "understandings" and its policing of compliance are among those that place conduct beyond the "mere announcement of [a seller's] policy and the simple refusal to deal" permitted by the *Colgate* case. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441.

[30] Of course, an arrangement need not require 100% exclusivity in order to violate Section 3, see, *e.g.*, *Englander Motors, Inc.* v. *Ford Motor Co.*, 267 F. 2d 11, 14 (C.A. 6) (violation even though dealer could sell competing parts "where the company is unable to supply them or the purchaser has specifically requested the dealer to use some other part"); *Carter Carburetor Corp.* v. *Federal Trade Commission*, 112 F. 2d 722, 725 (par. 11), 731–32 (C.A. 8). Thus, the Commission was clearly correct in holding that the mere fact that Timken permitted dealers to retain competitive bearings for "emergency" or "accommodation" purposes did not take the case out of Section 3 (App. C, *infra*, at p. 22c).

CONCLUSION

We recognize that, the decision below having been grounded on the theory that the Commission's order was not supported by substantial evidence, it is of a type that the Court will not generally review. We nevertheless submit that this case, in which an overwhelmingly dominant firm has been found beyond the reach of Section 3 of the Clayton Act only by virtue of an opinion grossly misapplying the proper standards for judicial review of agency orders, is of that exceptional character recognized by this Court as being appropriate for review here. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
J. WILLIAM DOOLITTLE,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JAMES McI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
ALVIN L. BERMAN,
THOMAS F. HOWDER,
Attorneys,
Federal Trade Commission.

JULY 1962.

APPENDIX A

No. 14526

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE TIMKEN ROLLER BEARING COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

Decided February 16, 1962

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before MILLER, Chief Judge; MARTIN, Circuit Judge; and DARR, District Judge.

MARTIN, Circuit Judge. The Timken Roller Bearing Company, petitioner, seeks review of an order issued against it by the Federal Trade Commission, Respondent, ordering it to cease and desist from certain practices alleged to be in violation of Section 3 of the Clayton Act (15 U.S.C.A., § 14).

This section, in pertinent part, provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for . . . resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Commission does not charge that Timken entered into any contract in writing, or agreement, contrary to the mandate of this statute; but it accuses the petitioner of violating Section 3 by following a consistent policy of "exclusive dealing." Specifically, the last part of Paragraph Six of the Complaint charges: "Respondent [petitioner here] has followed a consistent policy of requiring the distributors and jobbers to whom it sells its tapered roller bearings for resale, to discontinue handling like or similar products supplied or sold by any competitor or competitors of respondent and not to handle any such products except those sold to such distributors and jobbers by the respondent."

In support of the accusations contained in the Complaint, the Commission introduced in evidence numerous documents purporting to prove Timken's consistent policy of exclusive dealing. The majority of these documents consisted of salesmen's reports to the Timken home office, recommending the taking on of a new account or the canceling of an old one. In our view, the Commission's whole case rests upon the fact that, in these reports, the salesmen either recommended Timken's taking on a new account because it would be "loyal" to that company, or suggested that an old account be cancelled because the dealer was stocking the products of a Timken competitor.

At the close of the Commission's case, Timken moved to dismiss the Complaint on the grounds that the Commission had failed to prove its case. The Hearing Examiner granted the motion and ordered the Complaint dismissed. An appeal was taken from this initial decision to the Federal Trade Commission. That tribunal vacated the order of the Hearing Examiner and remanded the case for further proceedings.

Further hearings were held at which Timken introduced evidence to rebut the charges in the Complaint and to explain the circumstances surrounding each and every one of the documents relied upon by the Commission. In the main, this evidence went to show that by "loyalty" Timken meant that its dealers should devote themselves primarily to the resale of Timken bearings; and that there was no hard and fast policy on the part of the company to instruct its dealers not to stock bearings manufactured by a competitor. The evidence also showed that in every case where a dealer's account was cancelled, that dealer had bought no Timken bearings, or almost none, for a long period before the cancellation. Finally, the evidence showed the custom in the bearing resale industry to be the stocking of only one brand of bearings, because of the prohibitive inventory cost of carrying more than one brand of the same bearing in stock.

In rebuttal, the Commission introduced one dealer who testified that Timken had cancelled him out because he dealt in the products of a competitor, and another witness who testified that it was not the general custom to stock only one brand of bearings.

At the close of all the evidence, the Hearing Examiner made a second initial decision, in which he again dismissed the Complaint on the grounds that it had not been sustained. Another appeal was taken to the Federal Trade Commission; and, once more, the Commission set aside the decision of the Hearing Examiner and entered an order against the Timken Company, directing it to cease and desist from practices of which complaint was made. Petitioner seeks our review of that order.

The Commission's findings as to the facts are conclusive on review, if they are supported by substantial evidence in the record considered as a whole. *Uni-*

versal Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474, 488 (1951); Section 11(c) of the Clayton Act, 15 U.S.C.A., § 21(c).

The principal Findings of Fact upon which the cease and desist order is based are those numbered Five and Six: "(5) . . . that respondent [Timken] has followed a consistent policy of requiring said purchasers to discontinue handling similar products sold by respondent's competitors . . .:" and "(6) . . . that respondent [Timken] has failed to weaken the probative value of the documentary evidence adduced in support of the complaint."

Even under our limited scope of review, we are of opinion that these Findings of the Commission, and the order based upon them, must be set aside as not supported by substantial evidence on the record considered as a whole. Only one witness testified that he had been cancelled out as a Timken jobber because he had dealt also in bearings manufactured by a competitor, while thirty-seven Timken distributors and jobbers testified that they not only felt free to deal in competitive bearings, but had actually done so to some extent.

Moreover, Timken introduced evidence showing that in each and every one of the cancellation instances referred to in the documents relied upon by the Commission, the dealer in question had brought about his own cancellation by either failing to purchase any Timken bearings for a long period of time, or by requesting that he be cancelled.

Finally, numerous Timken officials testified that their company had no such exclusive dealing policy, and that its dealers did handle competitive bearings with the full knowledge and consent of the company, so long as their primary effort was devoted to the Timken line. It is important to note here that the

Hearing Examiner, who saw and heard the witnesses, stated that he believed all who testified on behalf of Timken.

Even if the testimony of the single jobber who testified that he was cancelled by Timken for dealing in competitive bearings be true, this isolated instance does not constitute substantial evidence of a consistent policy of exclusive dealing such as would justify entry of the cease and desist order here under review. Nor can the documents alone be substantial evidence of such a policy, inasmuch as, even if these reports show that Timken cancelled dealers' accounts because they were dealing in competitive bearings, this alone is not illegal. Perhaps the rule has best been stated for our purposes in the following language: "The anti-trust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's products and a manufacturer is not compelled to retain dealers having divided loyalties adverse to the interests of the said manufacturer or distributor." *McElhenny Co., Inc.* v. *Western Auto Supply Co.*, 167 F. Supp. 949, at page 954, affirmed 269 F. (2d) 332 (C.A. 4).

A seller has the right to select his own customers. This right is protected by the Clayton Act, itself. 15 U.S.C.A., § 13. The right has been recognized by the authorities, even where it was not expressly provided for by the statute. *United States* v. *Colgate & Company*, 250 U.S. 300; *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 594; *Naifeh* v. *Ronson Art Metal Works*, 218 F. (2d) 202 (C.A. 10). To uphold the order entered by the Commission in this case would be, in effect, to destroy this right. Here there has been proved no "condition, agreement or understanding" such as has been made unlawful by the Act. Nor has there been proved any consistent policy

of exclusive dealing as was alleged in the Complaint. All that has been proved here is that a seller has exercised its right to select the people to whom it will sell.

We are of opinion, therefore, that the cease and desist order entered by the Commission against the petitioner, Timken, should be set aside, inasmuch as it is not supported by substantial evidence in the record considered as a whole.

The Complaint against Timken Roller Bearing Company is ordered to be dismissed.

APPENDIX B

No. 14526

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE TIMKEN ROLLER BEARING COMPANY, PETITIONER *vs.* FEDERAL TRADE COMMISSION, RESPONDENT

ORDER

Before: MILLER, Chief Judge; MARTIN, Circuit Judge; and DARR, District Judge.

On Petition for Review of an Order of the Federal Trade Commission.

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the cease and desist order of the Federal Trade Commission be and it is set aside and the complaint against The Timken Roller Bearing Company, Petitioner, is ordered to be dismissed.

Approved for entry:

/s/ JOHN D. MARTIN,
United States Circuit Judge.

[Filed: February 16, 1962]

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APPENDIX C

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners: EARL W. KINTNER, Chairman; ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, EDWARD K. MILLS, Jr.

In the Matter of THE TIMKEN ROLLER BEARING COMPANY, A CORPORATION

Docket 6504

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondent on February 13, 1956, charging it with having made sales and contracts for the sale of its tapered roller bearings on the condition, agreement or understanding that the purchasers thereof should not use or deal in similar products of a competitor or competitors, in violation of Section 3 of the Clayton Act (15 U.S.C. Sec. 14). In its answer, respondent denied the charges.

At the close of the introduction of evidence in support of the complaint, respondent filed a motion to dismiss the complaint for failure of proof. In an initial decision filed October 14, 1957, the hearing examiner granted the motion and ordered that the complaint be dismissed. Upon appeal to the Commission by counsel supporting the complaint, the Commission on May 27, 1958, with former Chairman

Gwynne dissenting, held that a prima facie case had been established and issued its order vacating the initial decision and remanding the case to the hearing examiner for further proceedings. Thereafter, further hearings were held before the hearing examiner and testimony and other evidence in opposition to the allegations of the complaint, together with certain rebuttal evidence introduced by counsel supporting the complaint, were received into the record. In an initial decision filed March 21, 1960, the hearing examiner found that the charges had not been sustained by the evidence and again ordered dismissal of the complaint.

Counsel supporting the complaint filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be granted and that the initial decision should be vacated and set aside. The Commission now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Timken Roller Bearing Company, is a corporation organized under the laws of the State of Ohio, with its principal office and place of business located at Canton, Ohio.

2. Respondent is now and for many years last past has been engaged in the manufacture, sale and distribution of tapered roller bearings, alloy steels, and rock bits. Respondent sells a substantial portion of its tapered roller bearings to distributors and jobbers who handle and sell said products for replace-

ment purposes in automobiles, trucks, buses, tractors, farm machinery and other types of industrial machinery. Respondent also sells its tapered roller bearings for use in original equipment, but these sales are not involved in this proceeding.

3. Respondent causes its tapered roller bearings, when sold, to be shipped from its manufacturing plants located in Canton, Gambrinus, Bucyrus, Columbus, New Philadelphia and Zanesville, all of which are located in the State of Ohio, to purchasers thereof, including distributors and jobbers, who are located in the various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said tapered roller bearings in interstate commerce.

4. In the course and conduct of its business, respondent is now, and, during the times mentioned herein, has been, in substantial competition in interstate commerce with persons, firms, partnerships and other corporations in the sale and distribution of its tapered roller bearings.

5. Numerous documents introduced in evidence by counsel supporting the complaint show a policy on the part of respondent to sell its tapered roller bearings for replacement purposes on the condition, agreement or understanding that the purchasers thereof shall not deal in similar products sold by respondent's competitors.

These documentary exhibits fully support a finding that respondent has followed a consistent policy of requiring said purchasers to discontinue handling similar products sold by respondent's competitors; that respondent regularly checked said purchasers' stock for the purpose of assuring adherence to its policy, and that the contracts of purchasers who de-

viated from respondent's policy by purchasing from a competitor were cancelled for that reason.

6. Respondent based its defense principally on the testimony of numerous witnesses who had participated in the preparation of each of the aforesaid documents or who had direct knowledge with respect thereto, in an effort to explain, rebut and contradict that evidence. The Commission, after giving full consideration to that testimony, together with certain other testimony and exhibits entered by respondent, is of the opinion that respondent has failed to weaken the probative value of the documentary evidence adduced in support of the complaint.

7. Respondent's total sales of tapered roller bearings in the replacement market run between $10,000,000 and $20,000,000 a year. Its closest competitor, Federal-Mogul-Bower Bearings, Inc., does a yearly business of between $1,000,000 and $2,000,000 in tapered roller bearings, and the next competitor, Tyson Bearing Corporation, only between $400,000 and $800,000. Respondent manufactures more than 11,000 different items in its line of tapered roller bearings; its closest competitor, only 780; and the next competitor only 586. Respondent has over 7,500 dealers who handle its tapered roller bearings for replacement purposes; its nearest competitor has about 2,000 customers and the next competitor has 1,000 customers. Thus, the Commission finds that respondent is the leading supplier of tapered roller bearings for replacement purposes, the volume of business affected by its exclusive dealing policy is significant and substantial, and its maintenance of said policy has foreclosed competitors from a substantial market.

The record also shows and the Commission further finds that distributors and jobbers who have executed contracts with respondent suffer substantial injury to

their respective businesses because they are foreclosed by respondent's aforesaid policy from making any independent judgment or decision as to what products they will handle and sell in their business enterprises and lose substantial sales because they are unable to carry and sell competitive tapered roller bearings.

8. The effect of respondent's restrictive policy, as found herein, may be substantially to lessen competition in the lines of commerce in which respondent and its customers are engaged, and may be to tend to create a monopoly in respondent in the manufacture, sale and distribution of tapered roller bearings.

CONCLUSION

Respondent's policy of requiring its distributors and jobbers to handle and sell its tapered roller bearings exclusively and its acts and practices to enforce this policy; as hereinbefore found, are in violation of Section 3 of the Clayton Act.

ORDER

IT IS ORDERED that the respondent, The Timken Roller Bearing Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution for replacement purposes of tapered roller bearings in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondent.

2. Enforcing, or continuing in operation or effect, any condition, agreement or understanding in, or in connection with, any existing contract of sale, which is to the effect that the purchaser of such products shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondent.

IT IS FURTHER ORDERED that respondent, The Timken Roller Bearing Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order to cease and desist.

By the Commission. Commissioner Mills not participating for the reason he did not hear oral argument herein.

[SEAL] ROBERT M. PARRISH,
Secretary.

ISSUED: January 24, 1962.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners: EARL W. KINTNER, Chairman; ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, EDWARD K. MILLS, Jr.

In the Matter of THE TIMKEN ROLLER BEARING COMPANY, A CORPORATION

Docket 6504

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

Respondent, The Timken Roller Bearing Company, is charged with violation of Section 3 of the Clayton

Act by selling its tapered roller bearings on the condition, agreement or understanding that the purchaser will not deal in similar products of respondent's competitors. The hearing examiner in his initial decision filed on March 21, 1960, held that the allegations were not sustained by the evidence and ordered dismissal of the complaint. Counsel supporting the complaint have appealed from that decision.

In a previous initial decision, the hearing examiner granted respondent's motion filed at the conclusion of the case in chief in support of the complaint, and dismissed the complaint for failure of proof. Upon appeal by counsel supporting the complaint, we decided that the hearing examiner had erred in discounting the probative value of the documentary evidence introduced in support of the complaint and in refusing to admit into evidence numerous other documents of similar import. We concluded that a prima facie case had been established and by our order of May 27, 1958, the initial decision was vacated and the case remanded to the hearing examiner for further proceedings. Although ostensibly for a different reason, the hearing examiner has persisted in his previous erroneous evaluation of the documentary evidence relied on by counsel supporting the complaint.

Respondent is the largest manufacturer and seller of tapered roller bearings in the United States. This proceeding is concerned only with respondent's sales of such bearings for replacement and repair purposes. Its sale of bearings for use as original equipment is not involved. Its two principal competitors in the replacement market are Federal-Mogul-Bower Bearings, Inc., and Tyson Bearing Corporation.

Respondent maintains 17 sales offices throughout the country, each in charge of a branch manager. It

distributes its bearings through two general classes of customers designated as Authorized Distributors and Authorized Jobbers. The principal distinction between these two is that the distributors buy directly from respondent, whereas the jobbers buy only from the distributor. Prior to 1955, the discount rate to distributors was higher than that to jobbers. Since that time, both pay the same price but respondent allows a specified credit to distributors on sales which they make to jobbers.

Respondent enters into sales contracts with both its distributors and jobbers. These contracts are subject to cancellation by either party upon ten days' written notice. Neither type of contract contains any provision expressly requiring purchasers not to deal in the bearings of respondent's competitors. It is well settled, however, that express written agreements are not needed to prove exclusive dealing. *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722 (8th Cir. 1940).

As proof of the charge that respondent follows a consistent policy of requiring exclusive dealing, counsel supporting the complaint relied almost entirely upon documentary evidence obtained from respondent's files. These documents can be divided into two general types. The first group, about 120 documents, include salesmen's reports of calls on distributors and jobbers, copies of which went to respondent's home office; correspondence between branch managers and home office officials; and memoranda authorizing cancellation of respondent's agreements with its customers.

Typical of the statements by salesmen in this first group are the following:

> "Today I was of course greeted with a very strong bid for a direct appointment and in

checking their stock we found approximately $100 worth of new Bower Bearings mixed in with the Timken. This was the first indication that they had bought Bower Bearings in the past five years. * * * He further stated that he made a survey of some of these dealers on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying and it would only be a question of time when we would cancel his contract or put him on direct. * * *". (Commission Exhibit 26A and B)

"* * * They are going to go Timken 100%. He told us they had made some progress in liquidating their stock of Tyson bearings and would continue to exert every effort to liquidate this stock 100%." (Commission Exhibit 30)

"Inasmuch as it would be desirable to get rid of their entire Bower stock at one time I suggested they put a price on it from 10/20% under cost and sell it to a present Bower account or dispose of it in that manner and to best compensate them for the loss we would sign them direct and let them purchase their Glendale Timken stock at Authorized Distributors' prices." (Commission Exhibit 37)

"Called here for further talks with these people about their going Timken 100%." (Commission Exhibit 38)

"* * * Mr. Shaw told me that they will get Tyson out immediately and completely, if we

can work something out for them. He is waiting to hear something from us in the near future regarding this matter." (Commission Exhibit 40)

"I pointed this drop in volume out to Mr. Cox today and he stated that he could not continue to buy at 58 from Indiana Bearings (respondent's distributor) and had accordingly decided to buy from ABC Bearing Company. I explained to Mr. Cox that he was committing an act which we considered disloyal. * * *

* * * * *

"I told Cox that since his purchases were made through the Indiana Bearings Company that a matter of this nature should be direct with Indiana Bearings and that our position was one of not wishing Timken Jobbers to handle a competitive line of roller bearings.

"Cox insists that if this is our attitude he will discontinue Timken and under the circumstances, feel that we have no choice but to cancel his Timken Jobber contract." (Commission Exhibit 103B)

"When this jobber was signed as a Timken contract jobber in April of 1947, his initial stock order was for $354.42. Since that time his purchases have been almost nothing. Reason—he had been buying Bower tapered roller bearings from Ahlberg and now from Federal Mogul.

"We have been patient long enough! Dual distribution is not profitable or worthwhile to us. I suggest we cancel this account as a Timken contract jobber immediately." (Commission Exhibit 158)

The following statements are taken from correspondence from the branch managers to Timken officials:

"* * * Recently, for the reasons outlined in Deen Jones' attached report of March 27, they

fell for the Bower warehouse deal due to their close association with the F-M salesman * * *.

"I would appreciate your authority to write them the usual cancellation letter * * *." (Commission Exhibit 12)

"About eight months ago subject A.D. started picking up Bower bearings from the local Indianapolis Federal Mogul Warehouse.

"You doubtless have noticed from our representative's Dave Mitchell's reports that this matter has been discussed at length with these people.

"Additionally, I have discussed the matter with their management on several occasions. On my last call two week's ago, I tried to bring the matter to a conclusion one way or the other and was refused the courtesy of a discussion.

"This account has never been of any consequence and due to the circumstances involved we request management's approval for immediate cancellation." (Commission Exhibit 13)

"I naturally approached him on the idea of going 100% Timken in all of his stores. Further that our only requirement was that he confine his tapered roller bearing purchases to us exclusively in the future and could dispose of his present inventory in the manner he found best fit but could not palm them off on the trade as substitutes for business promoted through the prestige and completeness of our line.

"He wants about thirty days to pressure Tyson into converting his obsolescence into faster moving merchandise that will enable him to sell out his entire stocks in a one package deal. Naturally Tyson would not 'fall' for such a deal if they knew he planned to do this. Failing in this he will pull all of this stock into his main store and attempt to dispose of them in

this manner." (Commission Exhibit 29A and B)

"In addition to the information contained in this report, we definitely suspect that these people are already availing themselves of another source of supply for a portion of their requirements whereas we are confident that we can depend upon their 100% loyalty with direct recognition." (Commission Exhibit 91B)

"I learned today that subject purchased a quantity of surplus bearings just a short while ago, and I think this act of disloyalty is justification for our cancelling the account. Would like to have your authority to cancel this firm." (Commission Exhibit 107)

"* * * Previously this account had been buying in the open market and to satisfy us I personally called on them and felt reasonably sure at that time they would discontinue this practice. As it is they have not borne out this belief for they continue to buy on the open market * * *.

"It is my recommendation they be cancelled and I would like to have the authorization to do so." (Commission Exhibit 138A)

Finally, there are documents prepared by Mr. E. H. Austin, then General Manager of respondent's Service Sales Division and, as such, the highest official in the division which directed sales and supervised distribution in the replacement market. His statements include the following:

"In view of the fact that this account has decided to go 'Bower' we are agreeable to your effecting cancellation, immediately." (Commission Exhibit 11)

"Since they apparently are not loyal to us as a source of supply, I think we should do one of two things—either get their support or eliminate this account." (Commission Exhibit 90A)

"I have noted Mitchell's report of March 13. It looks to me as though we are going to have to do one of two things—either appoint the subject company on a direct basis if that is what it takes to eliminate Bower or cancel them as a Contract Jobber if they continue to purchase Bower bearings. Let's not delay on this but endeavor to settle this satisfactorily to our best interests." (Commission Exhibit 109B)

"This has reference to your letter of June 11 and our conversation about this subject.

* * * * *

"Of course, if they are going to handle Bower bearings we will want to cancel them but, in the meantime, as I indicated to you, I am taking a look at our Contract Jobber policy and we may find it to our advantage to withhold this cancellation and take a look a little later." (Commission Exhibit 115A)

"This refers to our previous correspondence under this subject, last of which was my note of June 27 answering yours of June 11. If this company is still handling Bower bearings as a distributor through Federal-Mogul, then I think that you should take the necessary action to bring about their cancellation as a Contract Jobber. I suggest this since I have decided, at least for the present, that we will not take any action to change our present Contract Jobber policy." (Commission Exhibit 115B)

In addition to the inter-office correspondence and memoranda, counsel supporting the complaint relied on a second group of documents comprised of reports of cancellation of approximately 100 distributors and jobbers. These reports are on a form, copies of which were sent to the home office, on which appears the question, "Why is this account being cancelled?" In all of these reports, the answers are "Have taken on Bower through Federal Mogul," "Took on Bower," "Not loyal," "Handling a competitive bearing," or similar expressions denoting that the customer was buying from a competitor.

This documentary evidence implicates individuals throughout respondent's entire replacement sales organization, from salesmen through home office executives. They cover the activities of the sales organization in all parts of the country and relate to transactions well within the period of time contemplated by the complaint. The hearing examiner's ruling that these documents represent only a relatively small number of isolated instances is clearly in error.

At hearings held after remand, respondent called 80 witnesses, 38 of whom were their customers and 42 of whom were personnel in the Service and Sales Division. These witnesses testified with respect to every written exhibit placed in evidence by counsel supporting the complaint. It is on the basis of this testimony that the hearing examiner has found that in every instance evidenced by the cancellation reports, the initiative in severing the relationship was taken by the customer rather than by the respondent.

One of the reasons advanced by the witnesses and accepted by the hearing examiner as a basis for his ruling was that the contracts were terminated because of the customers' low volume of purchases. Documentary evidence introduced by respondent indicates

that in some instances, customers had made very few purchases of Timken bearings for several months or a year prior to cancellation. With respect to these accounts, however, it appears that respondent had been aware of their purchase records but did nothing to cancel them until they started purchasing from a competitor. One of respondent's branch managers, after receiving a salesman's report that a jobber had decided to buy from the ABC Bearing Company, stated in a letter to the home office:

> "You will note that this Timken Jobber's purchase history is very poor. They should be cancelled due to lack of volume and now since they have been disloyal it seems the best thing to do is cancel their contract." (Commission Exhibit 103A)

To the same effect are Commission Exhibits 106, 106A and Respondent Exhibit 126. The fact that low volume of purchases contributed to respondent's decision to cancel is not the controlling factor. As the court has recently stated in the *Osborn*[1] case:

> "As to the termination of the second lease, the Judge concluded that both the plaintiff's failure to sell sufficient gasoline and his refusal to purchase more Goodyear TBA contributed to Sinclair-Sherwood's decision to cancel, neither of the two factors being predominant. The District Judge correctly pointed out that such combination of factors would not defeat the plaintiff's claim as long as the illegal motive substantially contributed to the decision to cancel."

Respondent introduced into evidence the purchase records of each of the accounts covered by the cancellation reports. An examination thereof discloses

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[1] *Osborn v. Sinclair Refining Co.*, — F. 2d — (4th Cir. 1960).

that, in many instances, any appreciable decrease in purchase volume occurred just one or two quarters prior to cancellation. In our opinion, this decrease did not supply the motive for termination but was the natural result of the purchaser's action stated on the report as the basis for cancellation, that is, that the purchaser had commenced buying from a competitor.

There is testimony that certain customers decided to purchase from competitors and asked to be cancelled. However, it appears that at least in certain instances, these customers "asked" in the sense that they were familiar with the inevitable result of their decision. One salesman, after stating in his report that a jobber, Mr. Meadows, had informed him that he had decided to buy from Federal-Mogul-Bower, added: "Meadows advised that he would expect our cancellation notice at any time, therefore I think we should oblige him and immediately cancel his contract." He was cancelled within two weeks upon authority of Mr. Austin.

Counsel supporting the complaint contend that the hearing examiner erred in ruling that the record affords no basis for an inference that the salesmen's practice of checking the stock constituted policing of customers indicative of a policy of exclusive dealing. In substance, the hearing examiner found that the reason salesmen checked customers' stock was to insure an adequate inventory, to supervise respondent's obsolescence policy and to check shortages in stock to obtain an order.

Most of the correspondence exhibits disclose that it was the salesmen's practice to include in their reports a reference to the competitive stock on the dealers' shelves. It is obvious from these references that the salesmen went far beyond the mere observance of com-

petitors' products while checking Timken bearings. In many instances, the actual number or dollar amount of competitive bearings was reported, such as "However, his stock indicates that he has already Bought $100–$500 of Bower, * * *" (Commission Exhibit 109A), and "on this call there were 132 pieces of Bower * * *" (Commission Exhibit 162). In other instances the reference was even more specific, as "We noticed 6–898–8923 and 6–71450–71750 Bower bearings in stock" (Commission Exhibit 94) and "* * * I was truly disheartened to find an additional 40 Bower bearings in his stock which represented a $59.56 additional purchase from Gibson Company" (Commission Exhibit 108A). Finally, the statement by one salesman that "We will keep close check on this stock and, if additional L & S bearings are purchased, we will take necessary action" (Commission Exhibit 97A) hardly reflects the action of a person interested only in a dealer's stock of Timken bearings. Moreover, there are instances where customers were called on to explain the presence of a competitor's product on their shelves. We think the evidence fully supports a finding that respondent policed its customers for the purpose of enforcing its exclusive dealing policy.

The hearing examiner found that the probative value of the correspondence is materially weakened as the result of the testimony giving the circumstances under which the correspondence took place. Typical of the statements appearing in the correspondence and the explanations relied on by the hearing examiner are the following:

> Commission Exhibit 10—"Meadows (jobber) advised that he would expect our cancellation notice at any time, * * *." Explained as meaning that account asked to be cancelled.

Commission Exhibit 29A—"* * * going 100% Timken in all of his stores." Explained as meaning that the distributor was going to handle Timken in all its stores and not just the main store.

Commission Exhibit 39—"I told him we would not condone his carrying Tyson bearings in his Laurinburg store as long as he was a Timken jobber." Explained by the writer, a salesman, as a gross exaggeration on his part as he knew they were already doing this.

Commission Exhibit 96—"We have been assured of Brown's complete loyalty to Timken." Explanation of this statement is that because of large initial purchase from Timken, there is no need for Brown (jobber) to buy competitive bearings.

Commission Exhibit 133—"Of course, they have Bower which they are willing to throw out for Timken." Explained as a figure of speech by the writer.

Commission Exhibit 144—"* * * he *agreed* that he would buy all his tapered bearings in the future from us." (Emphasis supplied.) Explained as a statement made by an official of the buyer.

Commission Exhibit 155—"Because this firm had become involved in the purchase of A.B.C. tapered roller bearings, a cancellation of their jobber contracts was effected June 24, 1954." Explained as meaning that the jobber had been cancelled at the request of the distributor who had difficulty collecting from this account.

Commission Exhibit 155B—(Letter from General Manager Austin to a branch manager) "If this company is still handling Bower bearings as a distributor through Federal-Mogul, then I think that you should take the necessary action to bring about their cancellation as a Contract Jobber." Explained as meaning that,

the jobber should be cancelled because of his low purchase volume.

There is obviously a variance between the statements quoted above and the explanation given by respondent's witnesses. Similar statements are too numerous in the inter-office correspondence to be explained as imprecise language by the writers. Where, as here, oral testimony given several years later, is not consistent with contemporaneous written statements; such oral testimony can be given little weight. *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). Although it is true that certain language standing alone may be susceptible of different meanings, we find that the varied explanations given by respondent fail to rebut the inference arising from the consistent use by respondent's representatives in all parts of the country, of such terminology as "100% loyalty," "go Timken 100%," and "We have their assurance," that an account will dispose of a competitor's stock. The hearing examiner's ruling that the correspondence has little probative value is clearly in error.

From our examination of the entire record, we are convinced that it is respondent's policy to sell its tapered roller bearings on the understanding or agreement that purchasers will handle Timken products exclusively; that dealers who contracted with respondent immediately proceeded to rid their shelves of competitive products and replace them with Timken; that respondent policed its dealers for the purpose of assuring adherence to its policy; that reports of deviations were received by the home office; and that those dealers who deviated were cancelled for that reason with the knowledge and authority of the home office. It is obvious that respondent's

conduct goes far beyond that of a seller who merely announces a policy and declines to sell to those who do not follow it. *Cf. United States v. Parke, Davis and Co.*, 362 U.S. 29 (1960).

Respondent has placed some reliance on the district court's decision in *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D.C. Minn., 1951). However, the court in that case relied in part upon a bulletin emanating from Case company officials directing its representatives not to attempt to dictate or coerce any dealer with respect to the handling of competitive merchandise and found that Case executives adhered to and fairly endeavored to sustain this policy. The evidence in this proceeding discloses no such concern on the part of Timken executives. In fact, as we have stated above, the evidence clearly indicates that key Timken executives supervised and actively participated in the company's exclusive dealing policy. The extent to which Timken's management was involved in enforcing this policy is apparent from the fact that documents in evidence implicate, among others, the general manager of the company's Service Sales Division and managers of branch offices in the following cities: Atlanta, Boston, Canton, Chicago, Cincinnati, Dallas, Detroit, Los Angeles, Memphis, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco, St. Louis, and Seattle. Also, many of the dealers cancelled by Case were those who had taken on Case products temporarily as a side line during the last World War so that Case would have an outlet for its allotment of the supply of farm machinery granted to Case by the government. Moreover, the evidence disclosed that dealers in farm machinery carry only one major line, one of the reasons being that it requires an

investment of $50,000, excluding real estate, to be a successful operator. The handling of a competitor's product obviously would require additional inventory. Timken customers are established dealers in replacement parts, and tapered roller bearings are only a small item in their inventory. The facts upon which the court made its decision in the *Case* matter clearly differ from those present in this proceeding.

Much reliance has been placed by respondent in this case upon the fact that its tapered roller bearings are interchangeable with those of its two closest competitors. All three use the same numbering system. Therefore, a bearing made by any one of the three may be replaced by a bearing of the same number by either of the other two. Respondent's argument is that distributors and jobbers are therefore inclined to carry only one line or brand of bearings, the inference being that account are cancelled if they decide to purchase a competitive line for any reason, since their purchases of Timken bearings would then cease entirely or decline to an insignificant volume.

While there is evidence that certain replacement parts dealers elect to handle only one line, we are not convinced that this is the practice generally followed by all members of the industry. One of respondent's own jobbers stated that:

> "You should have more than one brand on the shelves. * * * I believe it is a good idea to have more than one variety because you make more sales."

Additionally, there are reasons evidenced in this record as to why a dealer would elect to handle a competitor's product together with Timken's. These reasons include higher discounts and better service,

in certain instances, from competitors who manufacture a portion of the different types of tapered roller bearings produced by respondent and who sell to any dealer who chooses to purchase from them. Moreover, respondent's policing practices are inconsistent with a finding that dealers of their own accord carry only one line of tapered roller bearings. Regardless, however, of the tendency of some dealers to handle only one line, we think it clear that respondent cancelled its accounts in furtherance of its policy of exclusive dealing. Any other inference must be rejected.

The hearing examiner was impressed with respondent's witnesses. We cannot, of course, accept the conclusion of respondent's officials and salesmen that Timken had no policy of requiring exclusive dealing. However, the testimony of these witnesses that all respondent expects of its purchasers is that they devote the principal sales effort to the Timken line and that Timken purchasers handle competing bearings without interference on the part of Timken, is not inconsistent with our conclusion. It is clear from the record that the "principal effort" required by respondent is exclusivity. It is also clear that respondent allows its customers to purchase competing brands only on an emergency basis when there is a delay in obtaining Timken bearings or to accommodate an insignificant number of customers. The fact that respondent acquiesced in "emergency" or "accommodation" purchases is no defense in this proceeding where the evidence shows that respondent could and did exercise its power to cancel at any time it deemed necessary to implement its policy of exclusive dealing.

The testimony of respondent's current distributors and jobbers discloses that in practically all instances,

they were carrying Timken products to the exclusion of competitors' products except for the "emergency" or "accommodation" purchases above mentioned. Naturally, these dealers would cause the respondent no concern. We, as did the hearing examiner, can accept their testimony that they have not been threatened with cancellation by respondent.

There remains the question of whether respondent's exclusive dealing requirement, as evidenced by this record, "may be substantially to lessen competition or tend to create a monopoly in any line of commerce" as required by Section 3. The evidence received herein discloses that respondent's sales in the replacement market run between $10,000,000 and $20,000,000 a year; that it has more than 11,000 different items in its line of tapered roller bearings, and that its contracts cover over 7,500 different outlets. Respondent's nearest competitor does a yearly business of between $1,000,000 and $2,000,000 in the sale of tapered roller bearings; has 780 different items in this line; and has 2,000 customers for its tapered roller bearings. The next competitor's sales of tapered roller bearings amount to between $400,000 and $800,000 yearly; it has a mere 586 items in its line, and, at most, 1,000 customers. Thus, it is obvious that respondent is the leading supplier of tapered roller bearings in the replacement market and that a substantial share of that market is affected by its policy of exclusive dealing. That the probable effect of this policy is to substantially lessen competition is thus fully established. *Standard Oil Co. v. United*

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[2] Although respondent introduced certain evidence in an effort to show the economic advantages to a dealer in handling only one supplier's line of tapered roller bearings, this evidence has no bearing on the question of the competitive effect of respond-

States, 337 U.S. 293 (1949); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied* 349 U.S. 940 (1955); *Anchor Serum Company* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

Moreover, the record supports a finding of actual injury to respondent's competitors as a result of respondent's exclusive dealing policy. In many instances, competitors' products were on the shelves of distributors and jobbers at the time they entered into a contract with respondent. These dealers then proceeded to dispose of the competitive stock and replace it with Timken exclusively. As an example, one of respondent's branch managers, in a letter to Mr. Austin, stated in part:

> "Their Bower inventory in two stores runs, about $5,500 and we feel they should be good for about six or seven thousand a year on Timken once they get their Bower stock cleared out." (Commission Exhibit 71.)

It is evident that as a result of respondent's policy competitors were foreclosed from selling to over 7,500 established dealers in the replacement market.

As previously found, there are several reasons why dealers prefer to handle several lines or brands of tapered roller bearings. Because of respondent's policy, its dealers are not permitted to exercise any discretion as to the brands they will carry and sell. As a result, respondent's dealers are injured by not being able to take advantage of higher discounts

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ent's exclusive dealing policy. As we held in the matter of *Mytinger & Casselberry, Inc.*, Docket 6962, September 28, 1960, such economic considerations are irrelevant in a proceeding under Section 3 where, as here, the respondent has clearly foreclosed competition in a substantial share of the relevant market by its exclusive dealing requirement.

offered by some competitors and lose substantial sales because they are unable to carry competitive bearings. This is illustrated by the statement of one of respondent's salesmen who, in reporting a conversation with an authorized jobber, stated:

> "He further stated that he made a survey of some of these dealers (car and truck dealers) on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying * * *."
> (Commission Exhibit 29A and B)

Under the foregoing circumstances, the appeal of counsel supporting the complaint is granted. The initial decision is set aside, and we are entering our own findings as to the facts, conclusion and order to cease and desist in conformity with this opinion.

Commissioner Mills did not participate in the decision of this matter for the reason he did not hear oral argument.

JANUARY 24, 1961.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE TIMKEN ROLLER BEARING COMPANY, CORPORATION

Docket No. 6504

INITIAL DECISION

[Filed: March 21, 1960]

By WILLIAM L. PACK, Hearing Examiner.

Andrew C. Goodhope and *John Perochinsky*, for the Commission.

Day, Cope, Ketterer, Raley & Wright, Canton, Ohio, by *John G. Ketterer* and *John F. Buchman, III*, for the respondent.

1. The complaint in this matter charges the respondent, The Timken Roller Bearing Company, with violation of Section 3 of the Clayton Act (15 U.S.C.A., Sec. 14) through the maintenance of a policy under which its tapered roller bearings are sold on the condition, agreement, or understanding that the purchaser will not deal in similar products sold by respondent's competitors. Upon conclusion of the case in chief in support of the complaint, respondent filed a motion to dismiss the complaint for failure of proof, and on October 14, 1957, an initial decision was issued by the hearing examiner granting the motion and dismissing the complaint.